Cheryl Haddock - Testimony

Inconsistencies Between Michigan's IV-E State Plan and Its Adoption Assistance Policies

The web site of the Michigan Family Independence Agency contains a copy of a IV-E State Plan dated April 2001. Unless, the plan has been amended, it is out of compliance in several important respects. The state has relied on these incorrect policies to deny Alexander Haddock's eligibility for Title IV-E adoption assistance.
If the contents of the April 2001 plan remain unchanged, Michigan's adoption assistance policies and practices are much narrower than and inconsistent with federal law sections appearing its state plan that its federal funding would appear to be in constant jeopardy.

Michigan, like all states, makes specific reference to the federal adoption assistance law in its Title IV-E state plan. Michigan pledges to observe federal adoption assistance law set forth in the state plan, as a condition for federal financial participation. There are notable discrepancies between the federal provisions in the state plan, however, and Michigan's adoption subsidy policy as set forth in the CFA 750 of the policy manual and other documents. For example:

1. Federal law contains no reference to a four month stay in foster care as a requirement for Title IV-E adoption assistance and yet Michigan seeks to impose this provision as a condition for eligibility.

2. There is a specific reference to AFDC relatedness in federal law and the IV-E state plan that which does not appear in the Michigan Statutes or in CFA 750 of the Michigan Manual.

3. As federal law and policy issuances point out, the receipt of IV-E foster care funds is not a requirement to qualify for adoption assistance. The federal Children's Bureau corrected this policy in November 2001, with the publication of Information Memorandum (I.M.) 01-08. Unless the Michigan's IV-E State Plan was amended after the November 2001, policy change, it has been out of compliance with federal law for over three years. Since FIA cited the fact that Alexander Haddock did not receive IV-E foster care funds as grounds for denying the Haddock's administrative appeal, it is obvious that the state is attempting to impose an incorrect policy. If Michigan amended its April 2001 IV-E State Plan, then FIA is now out of compliance with its own document. Since the April 2001 plan is featured on the agency's web site, it is doubtful if the plan was ever corrected.

4. There is no requirement in federal law that an eligibility determination for adoption assistance must be rendered or an agreement for assistance be signed prior to the petition for adoption. As the April 2001, Michigan IV-E State Plan specifies, citing 45 CFR 1356.40(b)(1), the adoption assistance agreement "is signed by the adoptive parents and a representative of the State agency and is in effect before adoption assistance payments are made under title IV-E, but no later than the finalization of the adoption." The state has insisted that adoption assistance must be "certified" before a petition for adoption is filed, which is months before finalization. Michigan's policy, contrary to federal law would deny eligibility to families applying for adoption assistance after the adoption petition but well before the final decree of adoption. The state has invoked this provision as a basis for denying the Haddock's application for adoption assistance.

5. The plan cites Section CFA 738 as the source of compliance with federal law throughout the IV-E State Plan. Yet the online version of the Adoption Services Manual does not have a Section CFA 738. The state pledges support for the federal laws listed in the state plan, but relies consistently on more restrictive provisions in Section CFA 750 as the basis for denying adoption assistance to Alexander Haddock.

Michigan appears to have retained elements of an older state funded adoption subsidy program and incorrectly applied them to the federal Title IV-E adoption assistance program.

Special Needs 42 U.S.C. 673 (c)

Title IV-E State Plans, including Michigan's include the federal special needs definition:

Regulatory Reference/ Federal Statute	Requirement	State Statutory/Regulatory Policy References and Citation(s) for Each
473(a)(1)(A) 473(c)	1. Adoption assistance payments may be made to parents who adopt a child with special needs. A child will not be considered a child with special needs	Public Act (PA) 280 of 1939, as amended, MCL 400.1, et. seq.; MCL 400.115(f)-(m); CFA

	unless:	738, Program Eligibility, Certification
473(c)(1)	a. the State has determined the child cannot or should not be returned to the home of his or her parents;	CFF 902-2
473(c)(2)(A)	b. the State has first determined that a specific factor or condition exists with respect to the child (such as ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental or emotional disabilities) because of which it is reasonable to conclude that such child cannot be placed for adoption without providing adoption assistance or medical assistance under title XIX; and	CFA 738, Funding Source determination, Title IV-E
473(c)(2)(B)	c. a reasonable, but unsuccessful, effort has been made to place the child without providing assistance except where it would be against the best interests of the child due to such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child.	CFA 738, Program Requirements, Application

Neither the federal law nor Michigan's IV-E State plan state than a child must be in foster care for four months in order to qualify for Title IV-E adoption assistance. Yet, the state invokes this provision as grounds for denying eligibility for federal adoption assistance. The state has cited this provision as a basis for opposing the Haddock's request for adoption assistance.

Michigan's IV-E state plan consistently invokes Section CFA 738 of FIA's Adoption Services Manual as the source of its compliance with the special needs provisions in federal law. Yet, when one looks at the online version of the Adoption Services Manual, there is no Section CFA 738. Throughout the Haddock's appeal, the state has relied on the Section CFA 750 which contains eligibility provisions that are more restrictive than those set forth in the federal law that Michigan has pledged to abide by in the plan.

The Haddocks presented voluminous testimony to show that Alexander was born with fetal alcohol syndrome. The standard for "a reasonable, but unsuccessful to place the child without provision for assistance" has been "unless placement without assistance is contrary to the best interest of the child."

Federal law does not demand that the agency attempt to find a family to take a child without assistance under any circumstances. It speaks of "reasonable" efforts, unless it is contrary to the interests of the child. Over a decade ago, federal authorities at the Children's Bureau made it clear that the key question was not whether the parents could adopt without assistance, but if adopting without assistance was contrary to the best interests of the child. Nearly all parents can adopt a child without assistance in a literal sense, but it is frequently not a wise idea if the child faces the possibility of special needs and extensive treatment services. The law once again, refers to reasonable efforts and the best interests of the child. Encouraging or coercing parents to reject assistance when they believe that they need it, is contrary to federal law.

As the Children's Bureau pointed out in 1992 in Policy Interpretation Question PIQ 92-02, question 2:

> It was the intent of Congress, with the establishment of the adoption assistance program, to increase significantly the number of children placed in permanent homes. Thus, it is reasonable to conclude that it was not the intent of Congress that a child remain unnecessarily in foster care while the agency "shops" for a family which might be less suitable but is willing to adopt the child without a subsidy, if it has already found a suitable placement for the child.

The section of federal PIQ 92-02 quoted above has been incorporated into the current federal Child Welfare Policy Manual. When interpreted literally, the effort to place children that have significant special needs without subsidy is obviously unreasonable, because it undermines the very purposes of the federal adoption assistance program, namely to expedite and to sustain special needs adoptions. It also conflicts federal regulations at 45 CFR 1356.40 (f) which provide that "the State agency must actively seek ways to promote the adoption assistance program." (See Exhibit D).

The federal *Child Welfare Policy Manual*, points out that the existence of significant emotional ties with foster parents is only one reason why it might be contrary to the child's best interest for the agency to make an effort to place the child without adoption assistance. The *Manual* explains:

> Such an effort might include the use of adoption exchanges, referral to appropriate specialized adoption agencies, or other such activities. The only exception to this requirement is when it would not be in the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of those parents as a foster child. The exception also extends to other circumstances that are not in the child's best interest . . .

(See Exhibit E, from Section 8.2B.11, Question 1, (3) of the *Child Welfare Policy Manual* entitled "TITLE IV-E, Adoption Assistance Program, Eligibility, and Special Needs"). In other words, the reasonable efforts to place the child without assistance depend on the best interests of the child.

In *Adoption ARC, Inc. v. Department of Public Welfare*, a 1999 decision, the Commonwealth Court of Pennsylvania also reached the conclusion that there might be a number of reasons why it would be contrary to a child's best interest to be placed without adoption assistance. [See *Adoption ARC, Inc. v. Department of Public Welfare*, 727 A.2d 1209, 1214 (PA 1999) at www.fpsol.com/adoption/advocates.html] The court's interpretation of the entire sentence in the special needs section of the federal law, instead of a portion of it, played a significant role in its final determination.

Writing for the majority, Judge Joseph T. Doyle pointed out that the phrase "a reasonable, but unsuccessful, attempt has been made to place the child with appropriate adoptive parents without providing adoption assistance" is preceded by the qualification, "except where it would be against the best interests of the child because of factors such as the existence of significant emotional ties with prospective adoptive parents while in the care of the parents as a foster child." The use of "such as," he concluded, indicated that the reference to emotional ties with foster parents was intended to serve as an example, not the only situation where making a reasonable, but unsuccessful effort to place without assistance might be contrary to the child's best interest. In short, there might be a number of situations where making an effort to place the child without assistance would not be in his or her best interest.

AFDC Relatedness

The Michigan IV-E State Plan also includes the provisions for AFDC and SSI relatedness. As we noted previously, the Michigan IV-E State Plan contains direct references to the AFDC relatedness requirement along with the pledge to abide by it, but the provision does not appear in a clear and accurate form in its state policy manual at CFA 750.

The Haddocks testified that Alexander met the AFDC relatedness requirement by virtue of the fact that his birthmother's disability check was not deemed as income to the child. Alexander would have qualified for AFDC benefits had he been living in the home of his birthmother.

The AFDC relatedness section of Michigan's 2001 IV-E State Plan reads as follows:

Regulatory Reference/ Federal Statute	Requirement	State Statutory/Regulatory Policy References and Citation(s) for Each
473(a)(2)(A)(i)	3. Adoption assistance payments are made with respect to an adoptive child who:	CFA 738, Title IV-E Determination
473(a)(2)(A)(ii)	a. at the time adoption proceedings were initiated: (1) met the requirements of 406(a) or 407 of the	CFF 902-2, Title IV-E Eligibility Requirements

	Act (as effective 7/16/96), or would have met such requirements except for his or her removal from the home of a relative (specified in 406(a)) either pursuant to a voluntary placement agreement with respect to which Federal payments are provided under 474 (or 403) of the Act (as effective 7/16/96) or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of the child; or (2) meets all the requirements of title XVI of the Act with respect to eligibility for supplemental security income benefits; and (3) is a child whose costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent as provided in section 475(4)(B).	
473(a)(2)(B)(i) &(ii)(I)	(b) received aid under the State plan approved under 402 of the Act, or would have received aid under such plan had application been made, in or for the month a voluntary placement agreement was entered into or court proceedings were initiated leading to the removal of the child from his home; or	CFF 902-2, Title IV-E Eligibility Requirements
473(a)(2)(B)(i) &(ii)(II)	c. had been living with a relative specified in 406(a) of the Act within six months prior to the month in which a voluntary placement agreement was entered into or court proceedings were initiated leading to the removal of the child from his home, and would have received such aid under the State plan approved under 402 of the Act for that month if in that month the child had been living with such a relative and application had been made; and	CFF 902-2, Title IV-E Eligibility Requirements

All of the references to sections 406(a) or 407, 474 (or 403) of the Social Security Act (Sections 606(a), 607, 674 and 603 of the U.S. Code) are followed by the qualifying language ("as in effect on July 16, 1996"). Current provisions refer to the Temporary Assistance for Needy Families or TANF program that replaced the Aid to Families with Dependent Children (AFDC). AFDC-relatedness functions as an eligibility standard in the Title IV-E requirement insofar as the child must initially have been removed from the home of a relative in which the child would have qualified for the AFDC as it existed on July 16, 1996. Federal policy issuance ACYF-CB-PI-97-05, explained the application of the AFDC relatedness following the creation of TANF standard to the states in 1997.

Obviously, no child actually qualifies for AFDC benefits as the program no longer exists. All cases must be reconstructed, to determine if the child "would have received such aid" as the federal law puts it. Receipt of IV-E federal foster care funds is one means of establishing AFDC-relatedness because that AFDC-relatedness is an eligibility requirement for that program as well as for adoption assistance. The use of "would have received such aid" provisions in the federal adoption assistance statute from its inception clearly indicates that the actual receipt of AFDC was never the only way of satisfying the requirement. The

key question was whether the child received or would have received the assistance had an eligibility determination been completed. Federal adoption assistance law, as set forth in the IV-E state plan also states that meeting the eligibility requirements for the Supplemental Security Income or SSI program may be substituted for satisfying the AFDC-relatedness standard.

It is worth noting that Section CFA 738 of the Adoption Services Manual cited as the authoritative state equivalent to the federal law does not appear in the version of the manual currently on the FIA web site. CFF 902-2, also cited as source, appears in FIA's Foster Care Manual. While it is true that the Same AFDC requirements pertain to the federal foster care maintenance program as to IV-E adoption assistance, it seems strange that the state would not cite a section in the Adoption Services Manual as the authoritative source of its compliance with federal law.

The Requirement that Children must receive Title IV-E foster care in order to qualify for IV-E adoption assistance.

Michigan's April 2001 IV-E State Plan includes a provision stating that a child is eligible for adoption assistance only if he or she "is a child whose costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent as provided in section 475(4)(B)." FIA relied heavily on this provision to deny Alexander Haddocks' administrative appeal and to dismiss the numerous appeals decisions cited by the Haddocks in support of their son's eligibility.

The problem with FIA's position and with its inclusion in April 2001 IV-E State Plan, is that the federal Children's Bureau amended this policy over three years ago. As the Haddocks noted in their testimony, this policy was in effect briefly in 2001, then was corrected by the publication of federal Information Memorandum (I.M.) 01-08. In November of that same year.

The correction in Information Memorandum 01-08 stated

> We previously permitted otherwise eligible children who were voluntarily relinquished to private, nonprofit agencies to be eligible for title IV-E adoption assistance in certain circumstances. That policy should be followed as having been continuously in effect with no break

As the federal issuance explained, "the purpose of this Information Memorandum is to announce an amendment to the policy on voluntary relinquishments to private, nonprofit agencies that was set forth in ACYF-CB-PA-01-01." The section in ACYF-CB-PA-01-01 it was referring to was the following:

> The statute recognizes two types of removals: (1) children who are removed as a result of a voluntary placement agreement with respect to which title IV-E foster care payments were made; and (2) children who are removed as a result of a judicial determination to the effect that to remain in the home would be contrary to the child's welfare. Accordingly, children who are removed as a result of a voluntary placement agreement are removed via an avenue for removal authorized by the statute. However, removal is one of two requirements. The second requirement is that the child must have title IV-E foster care maintenance payments paid on his or her behalf pursuant to the agreement. Accordingly, children placed pursuant to a voluntary placement agreement under which a title IV-E foster care maintenance payment is not made are not eligible to receive title IV-E adoption assistance.

The problem this provision introduced was two-fold

1. Children placed through private agencies were voluntarily relinquished by birth parents for the sole purpose of adoption.

2. Children in the care and custody of private adoption agencies are not eligible for Title IV-E foster care payments.

When it was published in January 2001, ACYF-CB-PA-01-01 appeared to render most special needs children placed for adoption through private agencies ineligible for adoption assistance. This is the provision that apparently remains in Michigan's IV-E State Plan in spite of the federal correction and the provision the state relies on to deny adoption assistance to Alexander Haddock.

However as, I.M. 01-08 noted in November 2001," with this amendment, title IV-E adoption assistance is available in certain circumstances for otherwise eligible children who are voluntarily relinquished to a private, nonprofit agency." The circumstances are spelled out in *Section 8.2B.13 of the federal Child Welfare Policy Manual*.

1. Question: Is a child who is voluntarily relinquished to a private, nonprofit agency eligible for title IV-E adoption assistance? *Show History*

Answer: As authorized by section 473(a)(2)(A)(i) of the Act, a child is eligible for title IVE adoption assistance if s/he is removed from the home by way of a voluntary placement agreement with respect to which title IV-E foster care payments are provided, or as the result of a judicial determination that to remain in the home would be contrary to the child's welfare. However, a child who is voluntarily relinquished to either a public or private, nonprofit agency will be considered judicially removed in the following circumstances:

(1) the child is voluntarily relinquished either to the State agency (or another public agency (including Tribes) with whom the State has a title IV-E agreement), or to a private, nonprofit agency; and

(2) there is a petition to the court to remove the child from home within six months of the time the child lived with a specified relative; and

(3) there is a subsequent judicial determination to the effect that remaining in the home would be contrary to the child's welfare.

Under these circumstances, the AFDC-eligible child will be treated as though s/he was judicially removed rather than voluntarily relinquished. If the State agency subsequently determines that the child also meets the three criteria in the definition of a child with special needs in section 473(c) of the Act, the child is eligible for title IV-E adoption assistance.

The corrected federal policy does not require receipt of IV-E foster care payments in the case of children who are relinquished to private agencies as was the case with Alexander Haddock... The Haddocks have cited both I.M. 01-08 and *Section 8.2B.13 of the federal Child Welfare Policy Manual,* to refute the state's reliance on an argument that is out of compliance with federal law.

Adoption Assistance Agreements
The April 2001, Michigan IV-E State Plan specifies, citing 45 CFR 1356.40(b)(1), the adoption assistance agreement "is signed by the adoptive parents and a representative of the State agency and is in effect before adoption assistance payments are made under title IV-E, but no later than the finalization of the adoption." See Section 2a. in the section below.

Regulatory Reference/ Federal Statute	Requirement	State Statutory/Regulatory Policy References and Citation(s) for Each
475(3)	1. An adoption assistance agreement is a written agreement, binding on all parties, between the State agency, other relevant agencies, and the prospective adoptive parents.	MCL 400.115l; CFA 738, Support Subsidy Program Eligibility and Subsidy Agreements; Adoption Support Subsidy Agreement, FIA 4113
1356.40(b) ACYF-CB-PA-01-01	2. The adoption assistance agreement meets the requirements of 475(3) of the Act, and ACYF-CB-PA-01-01 as stated below:	

1356.40(b)(1	a. is signed by the adoptive parents and a representative of the State agency and is in effect before adoption assistance payments are made under title IV-E, but no later than the finalization of the adoption;	
1356.40(b)(2) 475(3)	b. specifies the duration of the agreement;	
1356.40(b)(3)	c. specifies the amount of the adoption assistance payments (if any) and the nature and amount of any other payments, services and assistance to be provided (including non-recurring adoption expenses in agreements that became effective on or after January 1, 1987) for expenditures incurred by the parents on or after that date);	
473(b)	d. specifies the child's eligibility for title XIX and title XX;	
475(3)(B)	e. specifies, with respect to agreements entered into on or after October 1, 1983, that the agreement remains in effect regardless of the State of residence of the adoptive parents;	
475(3)	f. contains provisions for the protection of the interests of the child in case the adoptive parents and child should move to another State while the agreement is in effect; and	
1356.40(d)	g. for agreements entered into on or after October 1, 1983, if a needed service specified in the agreement is not available in the new State of residence, the State making the original adoption assistance payment remains financially responsible for providing the specified service(s).	

There is no provision in federal law for adoption assistance to be "certified" or established by the time the adoption petition is filed. This requirement in Michigan's adoption services manual, contrary to federal law would deny adoption assistance to children whose parents applied after the adoption petition, but before the final decree of adoption.

Curiously, after citing 45 CFR 1356.40(b)(1) which specifies that adoption assistance agreements be completed by final decree of adoption, Michigan's IV-E State plan cites Section CFA 738 of the state's adoption services manual as an authority. The online version of the state's adoption services manual does not contain a section CFA 738. Throughout the Haddock's appeal, the state has referred to CFA 750 which states that "Eligibility for the Adoption Support Subsidy program

requires the following: 1. Determination of eligibility (Certification) for support subsidy by the Adoption Subsidy Program Office before the Petition for Adoption is filed with the court."

Not only has the state persistently tried to impose a more restrictive requirement than that set forth in 45 CFR 45 CFR 1356.40(b)(1), but the state commits itself to abiding by the more generous federal requirement in its IV-E plan. To make matter's worse, it cites an apparently non-existent section of the state's Adoption Services Manual as evidence of its compliance, while using a more restrictive provision in Section CFA 750 to deny assistance to Alexander Haddock.

It is also curious that the state cites ACYF-PA 01-01, but never refers to the more recent *Child Welfare Policy Manual,* that corrected the one section of P.A. 01-01 dealing with voluntary relinquishment to private agencies and incorporated most of the rest of the document. Section 8.4G of the *Child Welfare Policy Manual* affirms that:

> Federal regulations at 45 CFR 1356.40 (b)(1) require that the adoption assistance agreement be signed and in effect at the time of, or prior to, the final decree of adoption. However, if the adoptive parents feel they wrongly have been denied benefits on behalf of an adoptive child, they have the right to a fair hearing.

As the Haddocks have argued, over a decade of federal policy and case law has held that if the adoptive parents can show that they failed to execute an adoption assistance agreement through no fault of their own, then their child's eligibility for adoption assistance will be reviewed as if finalization had not taken place. As Section of 8.4G puts it, if the hearing show that extenuating circumstances prevented an adoption assistance agreement from being executed prior to a final decree of adoption, and

> If the child meets all the eligibility criteria, Federal Financial Participation (FFP) is available, beginning with the earliest date of the child's eligibility (e.g., the date of the child's placement in the adoptive home or finalization of the adoption) in accordance with Federal and State statutes, regulations and policies.